IN THE

Supreme Court of the United States

October Term, 1979

Docket No.
79-424

In the Matter of the Application
of
THE BOARD OF REGENTS of the University of the State of New York and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Petitioners,

vs.

MARY TOMANIO,

Respondent.

On Certiorari to the Court of Appeals
For the Second Circuit

BRIEF FOR RESPONDENT

VINCENT J. MUTARI
Attorney for Respondent
600 Old Country Road
Garden City, N.Y. 11530
(516) 746-4240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Docket No.
79-424

In the Matter of the Application

of

THE BOARD OF REGENTS of the University of the State of New York and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Petitioners,

vs.

MARY TOMANIO,

Respondent.

On Certiorari to the Court of Appeals
For the Second Circuit

BRIEF FOR RESPONDENT

INDEX

TABLE OF CASES AND STATUTES

FEDERAL STATUTES

TEXT

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

Docket No.
79-424

In the Matter of the Application
of
THE BOARD OF REGENTS of the University of the State of New York and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Petitioners,

vs.

MARY TOMANIO,

Respondent.

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. On the facts of this case was it error for the lower courts to hold that due process requires the offer of a hearing and a statement of reasons?

2. Did the Court below fail to give proper faith and credit to the interpretation of state statutes by the New York courts?

3. Did the Court below err in refusing to dismiss the complaint on the defenses of *res judicata* and failure to comply with the statute of limitations?

STATEMENT OF THE CASE

Dr. Tomanio, a 62 year old woman, has practiced chiropractic legally in New York State since 1958. After a licensing statute was first enacted there, she took a series of examinations, all parts of which she passed, except one, which she failed by six-tenths of one percentage point. She therefore applied to the New York State Regents for a waiver of that examination requirement, which the Regents were empowered to give by a provision of the State Education Law. The Regents refused her request without giving her a hearing or reasons for their refusal.

Dr. Tomanio then brought a proceeding in the state court on January 26, 1972 alleging that the Regents' refusal was an arbitrary and capricious exercise of their authority.

The New York State Supreme Court gave judgment for Dr. Tomanio and ordered the Education Department to issue a license to her. However, the Appellate Division reversed that judgment and that reversal was sustained by the New York Court of Appeals on November 20, 1975.

On June 25, 1976, Dr. Tomanio brought this action in the United States District Court for the Northern District of New York under the Fourteenth Amendment and the Civil Rights Act, 42 U.S.C. Section 1983, claiming that she was denied due process by the Regents when they refused her request for a waiver, without giving her a hearing or specifying reasons for their refusal. The Regents answered and moved to dismiss the action on the grounds of *res judicata*, a statute of limitations, and failure to state a cause of action.

The District Court denied the motion on all grounds and gave a declaratory judgment that Dr. Tomanio has been denied due process. The Court of Appeals, Second Circuit, affirmed. This Court granted certiorari.

SUMMARY

Dr. Tomanio's long years of legal professional practice prior to the enactment of a chiropractic licensing procedure in New York State was a "property" and "liberty" interest protected by the Fourteenth Amendment of the Constitution of the United States. She still had that interest when she applied to the Regents for waiver of her failure, by six-tenths of one percentage point, on one of three parts of the licensure examination. The interest continued through that waiver application procedure because (1) she was practicing legally at the time; (2) the procedure which the legislature had provided for those who substantially met license requirements, and Dr. Tomanio's factual situation which came so close to meeting those requirements, created an arrangement, understanding and reasonable expectation that she would receive her license; and (3) the interest protected was the right to continue professional employment.

Therefore, Dr. Tomanio was entitled to due process in connection with her waiver request since it involved the exercise of a very broad discretionary authority and, although the demands of due process vary depending on the facts of each situation, at a minimum, some kind of hearing and statement of reasons is required. Neither of these was provided at all.

None of the Regents' defenses of comity, *res judicata* or statute of limitations can be sustained. In holding that the Regents must utilize constitutional procedures in exercising their power, the federal courts have not decided any matter previously determined by a New York State Court, nor have they permitted relitigation of any issue raised in the state court proceeding by Dr. Tomanio. And the finding of the federal courts, that the *res judicata* doctrine does not apply, in federal civil rights cases, to issues that could have been, but were not, raised in a prior state court proceeding, serves the long recognized, valid and desirable purpose of preserving the right to a federal forum for constitutional questions.

The decision of the lower courts to toll the applicable statute of limitations, in certain civil rights cases, during the period in which a state proceeding is in progress, serves the interests of federalism and reduces the growing federal caseload of such litigation. Since Dr. Tomanio prosecuted her claims diligently and the policy of repose which underlies statutes of limitations is not frustrated in this case, the courts correctly tolled the statute in this instance.

POINT I

BOTH LOWER COURTS CORRECTLY FOUND THAT DR. TOMANIO HAD A "PROPERTY" AND "LIBERTY" RIGHT THAT MANDATED A DUE PROCESS HEARING AND STATEMENT OF REASONS.

There is no dispute of the fact that Dr. Tomanio was practicing chiropractic legally when she applied to the New York State Regents for a waiver of a licensure examination requirement so that she might continue to practice. She had been in practice before any licensing procedure was established and that practice was the sole support of her family. Even the Regents agree (Petitioners brief, at 8) with the District and Circuit Court findings that the opportunity to continue in her profession represented a Fourteenth Amendment "property" right as defined by this Court in *Board of Regents v. Roth*, 408 U.S. 564, 576-577 (1972). There, the Court stated that the term included "interests that a person has already acquired in specific benefits" even where statutory eligibility has not yet been established. This Court stressed, *Roth*, at 577, the importance of protecting "those claims upon which people rely in their daily lives" against arbitrary termination. And recently, in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 99 S. Ct. 2100, 2105 (1979), the Court emphasized the significance of situations such as Dr. Tomanio's by quoting Judge Henry Friendly. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1296 (1974):

"There is a human difference between losing what one has and not getting what one wants."

Dr. Tomanio's employment, and particularly its professional nature, also gave her a "liberty" interest. *Roth*, at 572, 574; *Willner v. Committee on Character*, 373 U.S. 96, 102 (1962); *Schware v. Board of Bar Examiners*, 353 U.S. 232, (1957); *Goldsmith v. Board of Tax Appeals*, 270, U.S. 117, 123 (per Ch. Justice Taft, 1926); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

After the New York State Legislature decided to license chiropractors, it provided for those already in practice to obtain licenses in two separate ways. One method was by meeting all of the requirements set forth in Section 6556 of the State Education Law (Petitioner's Brief, A-4 to A-7), including examinations. The other was by Section 211 of that law, which was replaced in 1971 by Section 6506, subdivision (5). The last statute permits waiver of "education, experience and examination requirements" for licensure upon a showing that such requirements have been "substantially met". This is the statute under which Dr. Tomanio applied for the waiver of her failure by six-tenths of one percentage point, on one of three parts of the examination.

Dr. Tomanio's right to continue to practice was recognized and accepted by the Regents during the eight years in which the special series of examinations for "grandfather" practitioners were administered, and during which, litigation and other attacks on the propriety of the first five examinations was undertaken by chiropractic groups. Surely that "property" and "liberty" right continued during the brief period following her narrow failure of a part of the test, when she tried to obtain the license she needed, in order to continue her practice by the other method provided by

the legislature; i.e., by demonstrating to the Regents that she had "substantially met" the requirements. She made her application on September 21, 1971, just a few weeks after Section 6506 (5) of the Education Law (Petitioner's Brief, at A-8) replaced Section 211 (Petitioner's Brief at A-9 to A-11). Section 211 did not give the Regents authority to waive examination requirements; but that power was added in the new statute. The new law and the change it encompassed certainly provided the kind of "rules or mutually explicit understandings" to support a claim of "property interest" contemplated in *Perry v. Sinderman*, 408 U.S. 593, 601 (1972), particularly in view of the fact that Dr. Tomanio had met all requirements for licensure, except one, and had come so close to meeting that one.

It should, perhaps, be pointed out that, when Dr. Tomanio applied for the waiver, she was still practicing legally. The letter from the State Education Department dated September 7, 1971 and received by her September 15, 1971 (Cir. Ct. proceedings, Ex. A. to app., at 34) to which petitioners refer (Petitioner's Brief, at 9) advised her only that, if she did not obtain licensure within 30 days, she then would be expected to give up her practice.

Since Dr. Tomanio had a "property" and "liberty" interest protected by the Fourteenth Amendment there can be no question as to her entitlement to due process when she applied to the Regents for a waiver. And due process mandates that an adjudicative decision be preceded by a hearing of some kind. *Goss v. Lopez*, 419 U.S. 565, 576 (1975); *Roth*, at 569, 570; *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). Further, as the Court of Appeals pointed out, this Court has specifically insisted on a hearing when the determination involved the discretionary power to admit to a profession. *Willner*, at 103; *Goldsmith*, at 123. And when, as here, the authority given to a state agency is so broad, and at stake is not the admission, but the right to con-

tinue, a long established professional practice, how much more compelling are the reasons for that finding.

Due process further demanded that the Regents give Dr. Tomanio reasons for their denial of her application. *Perry*, at 601; *Wilner*, at 105. It is clear from their letter of November 22, 1971 (Cir. Ct. proceedings, Ex. A. to app., at 33) that they failed totally, to do so, and comments made much later, in responsive pleadings, during the litigation challenging the decision, did not compensate for that failure.

This Court has made clear that the existence of a constitutionally protected "property" or "liberty" interest mandates due process, and that the relative weight of the interests involved determines only the kind of hearing and other elements of due process that must be afforded. *Goss*, at 576, 577; *Roth*, at 570, 571. In this case, no hearing at all and no reasons, were given to Dr. Tomanio, so no such weighing process can be used. Nonetheless, since the Regents have tried to raise that question, it is enlightening to consider here the three factors that this Court has indicated are pertinent, when what is being reviewed is the adequacy, rather than the total lack, of due process. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

> "First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

The "private interest" here is of enormous importance, the right of a 62-year old woman to continue to practice the profession by which she has supported her family for 22 years without a blemish to her personal or professional reputation and record. The significance of the second factor, with respect to the lack of a hearing, was best expressed by the Court of Appeals (A-60 n.2):*

> "....A logical argument can be made that, since Dr. Tomanio is licensed in two other states, has practiced successfully for so many years, and passed her National Boards, she might be able to convince an impartial hearing officer that she 'substantially' meets the requirements of the statute, notwithstanding her failure of the examination by six-tenths of one percent...."

Further, had Dr. Tomanio been given a hearing under circumstances likely to produce a fair and impartial decision, she could have offered evidence by her peer group and patients, of her competence and substantial compliance with licensure requirements, and other materials which might have been persuasive.

The result of the Regents failure to tell Dr. Tomanio why they rejected her waiver application, at the time they did, is more dramatic. Former Section 211 of the New York State Education Law (Petitioners' brief, at A-9 to A-11) empowered the Regents to waive professional licensure requirements only for out of state residents coming to New York to practice. Section 6506 (5) which replaced it, allows the Regents to:

> "Waive education, experience and examination requirements for a professional license prescribed in the article relating to the profession, provided the Board of Regents shall be satisfied that the requirements of such article have been substantially met;"

*References in ( ) are to Petitioners' appendices and papers.

The new statute cannot possibly be construed to reflect a legislative intent to restrict its application to persons coming to New York from other states. So the broadening of the power by a new statute must be seen as a deliberate effort by the state legislature to expand the potential benefits of the statute to New York residents. But, not until submission of the briefs in the Federal Court of Appeals, did Dr. Tomanio learn that the Regents have interpreted Section 6506 (5) as applying only to non-residents of New York, as did the former statute, and that this was at least part of the reason for their refusal of her waiver request. Had Dr. Tomanio been told this when her request was denied, she would have challenged the Regents interpretation of Section 6506 (5) in her state court proceeding.

And, as to the third factor mentioned in *Mathews*, the Regents' claim of the great burden which would be imposed by due process is belied by their own answer to the interrogatories in this matter (A-32). In response to a question as to whether a license had ever been granted under Section 6506 (5) or former Section 211, they answered that only one person beside Dr. Tomanio had ever applied for such a waiver. Certainly, it can be expected that the vast majority of "grandfathers" in any profession will either pass a new licensing examination, or will fail by too large a margin to raise a claim of substantial compliance.

This Court has not allowed administrative agencies to cavalierly dismiss due process with claims of inconvenience. As Justice White said in *Stanley v. Illinois*, 405 U.S. 645, 656 (1972):

> "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

It is therefore clear that, even if the criteria of *Mathews* were relevant in this situation in which no due process at all was afforded, they would testify to a very serious and unwarranted denial of a constitutional right by the Regents. In this context, Justice Marshall's words in *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78, 100 (1978) are appropriate:

> "....when the State seeks 'to deprive a person of a way of life to which she has devoted years of preparation and on which she has come to rely' it should be required to first provide a 'high level of procedural protection' ".

The Regents have cited cases in their brief which they claim support a thesis that this Court has been willing to deny due process even on a finding of a constitutional right. That, however, is not true. In *Leis v. Flynt*, 439 U.S. 438 (1979) and *Roth*, the Court found that no such right existed. And in *Mathews*, the determination was that a hearing at a later stage of the proceedings satisfied due process demands.

Although, as set forth above, the licensure examinations are not relevant to this matter, the Regents have tried to make them so. They continually stress Dr. Tomanio's failures in order to impugn her ability. In response, it must be said that there was sound cause for a competent chiropractor to fail those examinations. Many did. After the first two examinations, only 48% of "grandfathers" in Dr. Tomanio's experience category, had passed. The examinations were considered so inappropriate by the profession, that they were challenged in court, and the Appellate Division did, in fact, direct that they be changed.

Albert v. Allen, 27 A.D. 2d 615, 275 N.Y.S. 2d 759 (1966). The profession also contemplated suit to set aside the next three examinations, because critical portions were prepared by medical doctors whose viewpoint reflected their profession's fervent opposition to the recognition or legal existence of chiropractic as a healing art. However, before a new action was started, the law was changed so that all examinations, starting with the sixth, were prepared by chiropractors. It was this sixth examination which Dr. Tomanio failed by just six-tenths of a percentage point. The only other examination she took after that, and the only one available to her ever since then, is the regular examination given and geared to new graduates of chiropractic schools. This court surely understands how hard it is for a person who has practiced a profession and not been in school for 22 years, to cope with an academic examination.

In light of all of the foregoing facts, law and circumstances, the District Court and the Second Circuit were plainly correct in finding that Dr. Tomanio was denied due process to which she was constitutionally entitled.

POINT II

THE FEDERAL COURT DECISION DOES NOT DEAL WITH ANY MATTER ALREADY DETERMINED BY THE NEW YORK STATE COURTS.

The only determination made by the federal Courts in this matter is that the discretionary authority vested in the Regents must be exercised in a constitutional manner. No decision of a New York State Court is in conflict with that holding. Nor could the New York Courts interpret a statute in a way that would utilize it unconstitutionally.

The New York decisions which the Regents claim conflict with the determination herein, were all made in proceedings brought under Section 7803 (3) of the New York Civil Practice Law and Rules. That statute permits challenges to administrative rulings only to determine if the record presented to the Court indicates that they were arbitrary and capricious. The New York courts have interpreted their power under this statute to be confined to an examination of the record to find whether it shows any rational basis for the administrative finding, and have insisted that they cannot substitute their own judgment for that of the agency, *Purdy v. Kreisberg*, 47 N.Y. 2d 354, 391 N.E. 1307, 418 N.Y.S. 2d 329; *Matter of Pell v. Board of Educ.*, 34 N.Y. 2d 222, 231, 313 N.E. 2d 321, 326, 356 N.Y.S. 2d 833, 839 (1974). None of the New York decisions, dealing as they had to, only with the reasonableness of conclusions reached by administrative bodies, could possibly have conflicted with the findings of the federal Courts which dealt with procedures.

POINT III

THERE IS NO BASIS FOR A FINDING OF *RES JUDICATA*

The Regents have misstated the issues raised by the complaint herein. Dr. Tomanio did ask, *inter alia*, for the declaratory judgment which the court gave, that she had been denied due process. That issue was never raised in the state court proceeding.

Further, this court has repeatedly stated that plaintiffs who have a claim under the federal Civil Rights Act need not first seek relief in the state courts. *Preiser v. Rodriguez*, 411, U.S. 475, 477 (1972); *McNeese v. Board of Education*, 373 U.S. 668, 671 (1963); *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Therefore, the Second Circuit has ruled that constitutional issues not raised in a state court proceeding are not precluded by *res judicata* from subsequent litigation in a federal forum. *Ornstein v. Regan*, 574 F. 2d 115, 117 (2d Cir. 1978); *Lombard v. Board of Educ.*, 502 F. 2d 631, 635 (2d Cir. 1974), cert. denied 420 U.S. 976 (1975). To hold otherwise would be inconsistent. For as the court said in *Ornstein:*

> "To apply *res judicata* effect to a state remedy which need not be first sought, is to 'overrule the essence of *Monroe v. Pape.*' "

The refusal to find *res judicata* as to issues which could have been, but were not, raised in a state court proceeding is consistent with this Court's holding in abstention cases. The Court's position has been that a litigant who wants to prosecute a constitutional claim in a federal forum, cannot be compelled to do so in a state court. *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415, 417 (1964).

Since the issues raised in this matter were not raised in the New York courts, and the law does not preclude Dr. Tomanio from litigating in federal courts, issues which could have been, but were not, raised in state courts, there is no basis for a finding of *res judicata*.

POINT IV

THE LOWER COURTS PROPERLY EXERCISED THEIR POWER TO TOLL THE STATUTE OF LIMITATIONS.

It is well established law in the Second Circuit that the appropriate New York statute of limitations in Civil Rights cases is the three-year provision of Section 214 of the New York Civil Practice Law and Rules, which covers actions to recover upon a liability imposed by statute. *Swan v. Board of Higher Education of City of New York*, 319 F. 2d 56, 60, (2d Cir. 1963). The federal Court applied that in this matter, but tolled it during pendency of the state litigation. It did so for sound reasons of federalism. For only if a plaintiff is assured of not losing his right to turn to a federal forum for relief, will he refrain from bringing such an action until his state litigation is over. Such plaintiffs may then get complete relief from the state courts and avoid the federal suit entirely.

As the lower courts said, tolling was particularly appropriate in this case. Dr. Tomanio's state suit was brought promptly after the Regents refused her waiver request. The first decision was in her favor and was not finally reversed by the highest state court until after the three-year statute of limitations had expired. Dr. Tomanio then brought her federal action promptly. In no sense did she sleep on her rights.

Contrary to the Regents statements, this tolling policy has not been discredited, but has been endorsed again by the Second Circuit, *Leigh v. McGuire*, No. 79-7479 (Dec. 19, 1979), the Fifth Circuit, *Mizell v. North Broward Hospital District*, 427 F. 2d 468, 474 (1970) and the Third Circuit, *Ammlung v. City of Chester*, 494 F. 2d 811, 816 (1974). And except for *Ramirez de*

Arellano v. Alvarez de Choudens, 575 F. 2d 315 (1st Cir. 1978), all of the cases and circuits cited by the First Circuit and the Regents, support the tolling policy applied in this case. In fact there is a special irony in the fact that most of the Regents' citations are earlier cases in the Second Circuit, whose decision they are attacking here. Even in *Ramirez*, the refusal to toll was based chiefly on the court's interpretation of the local tolling statute rather than on rejection of the policy applied here.

Finally, the policy of repose which underlies statutes of limitations is not an issue here. There is no evidence to grow stale, no witnesses to forget. There is only an issue of law; and under these circumstances, the lower courts correctly tolled the statute.

CONCLUSION

The Court should affirm the decisions of the District and Circuit Courts and declare that Dr. Tomanio is entitled to a hearing before a fair and impartial body, and a statement of reasons, before a determination is made on her request for a waiver under Section 6506, Subdivision 5 of the New York Education Law.

Respectfully submitted,

VINCENT J. MUTARI
Attorney for Respondent
Office and Post Office Address
600 Old Country Road
Garden City, New York 11530
(516) 746-4240